No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition establishes a persistent and acknowledged split on the question presented: The Eighth, Ninth, and Eleventh Circuits, and the New Mexico Supreme Court, hold that officers' intentional application of force to a person is a seizure even if the person is temporarily able to evade capture, while the Tenth Circuit and the D.C. Court of Appeals hold to the contrary. Pet. 9-17. Respondents make no real attempt to refute that showing; they do not cite, much less discuss, most of the cases in the split.

As the four amicus briefs in support of certiorari confirm, the stakes for the American public could not be higher: The question presented is ultimately whether "a wide range of physical force deployed by police officers—including blunt force, chokeholds, Tasers, and lethal force—[is] wholly unregulated by the Fourth Amendment," if the victim is not immediately stopped by the use of force. ACLU Amicus Br. 2. Indeed, "[t]he result of applying the Tenth Circuit's rule will most often be to deny any availability of recovery to various victims of police misconduct." Cato Amicus Br. 8.

Respondents devote the bulk of their brief to defending the decision below, but only by mistakenly conflating seizures effectuated by physical force and seizures effectuated by a show of authority. People confronted by a mere show of authority by police are seized only if they actually submit to that authority. But people subjected to physical force by a police officer are seized at the moment that physical force is applied, even if they manage to escape apprehension.

Respondents' contrary position reflects ongoing confusion regarding the proper understanding of this Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991), and related decisions.

Respondents conclude by urging alternative grounds in support of the judgment below—grounds that no court below passed upon and thus have no bearing on this Court's review. The sole basis for the rulings of both courts below was that Respondents did not "seize" Petitioner when they shot her and hit her with two bullets, because she managed to drive away. That neither court addressed Respondents' alternative grounds is unsurprising, as those claimed grounds also rest entirely on disputed facts that would be inappropriate to consider at this summary judgment stage.

The Court should grant certiorari.

I. Both The Courts Of Appeals And State High Courts Are Divided.

Respondents do not dispute that the Tenth Circuit's holding below—that the officers' shooting of Petitioner could not amount to a Fourth Amendment seizure because she initially evaded capture—squarely conflicts with decisions in the Eighth, Ninth, and Eleventh Circuits. Had Petitioner's case arisen in the Eighth Circuit, it would have been governed by *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995), which, Respondents do not dispute, held that a "seizure is 'effected by the slightest application of physical force' despite later escape." *Id.* at 471 (quoting *Hodari D.*, 499 U.S. at 625). Had Officers Madrid and

Williamson fired upon Petitioner in Arizona instead of neighboring New Mexico, Respondents do not dispute that Petitioner would have benefited from the Ninth Circuit's rule in *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), which held that "when [a police] show of authority includes the *application of physical force*, a seizure has occurred even if the object of that force does not submit." *Id.* at 876 n.4. And in the Eleventh Circuit, the outcome would have been dictated by *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003), which, Respondents do not dispute, held that a seizure is effectuated when a bullet hits a suspect, regardless of whether the suspect is immediately stopped. *Id.* at 1263. The Brief in Opposition does not mention, let alone distinguish, any of these cases.

Respondents take issue only with the petition's discussion of *State v. Garcia*, 217 P.3d 1032 (N.M. 2009), but their rejoinder misses the mark. First, Respondents claim that "petitioner's reliance on state case law is improper." BIO 18. But of course a conflict between a federal court of appeals and state court of last resort on an important federal question is a proper basis for certiorari, and Respondents do not dispute that *Garcia* decided a federal question in a manner contrary to the Tenth Circuit below. *See* Sup. Ct. R. 10(b). Respondents also cite (BIO 18) *State v. Walters*, 123 N.M. 88 (N.M. Ct. App. 1997), but that case—decided by an intermediate court 20 years prior to the New Mexico Supreme Court's decision in *Garcia*—was an assertion-of-authority case in which there was no physical contact between the police officer and the defendant. And, as the New Mexico Supreme Court explained in *Garcia*, "[u]nlike assertion-

of-authority cases, there is no need for a defendant to demonstrate submission in cases of physical force." 217 P.3d at 1038.[1]

In short, Respondents have made no serious attempt to refute our showing of a split, which alone suffices to warrant this Court's review.

II. The Decision Below Is Wrong.

Respondents fare no better on the merits. They proclaim as self-evident that "[e]ven where some level of force is intentionally applied by a law enforcement officer, unless that force results in the actual termination of the suspect's movement, no seizure has occurred." BIO 11. But that proposition is precisely the question on which the courts have divided. Respondents' proposed rule is also wrong, as it fundamentally

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[1] Respondents also discuss *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), and *Troupe v. Sarasota County*, 419 F.3d 1160 (11th Cir. 2005), BIO 15-17. *Cole* stands for the uncontroversial proposition that where police officers *neither* make physical contact with a suspect (because their shots miss) *nor* cause a suspect to slow or stop (because the suspect does not submit to a show of authority), there has been no seizure. 993 F.2d at 1330-33. *Troupe* stands for the equally uncontroversial propositions that a shot that "did not strike anyone or anything" cannot be a seizure by physical force and that an officer's shooting at a car's driver does not necessarily mean that the car's passengers are seized. *Troupe*, 419 F.3d at 1164, 1167. And neither case alters those circuits' rules that physical contact between law enforcement and a suspect, whether or not it succeeds in stopping the suspect, constitutes a seizure. *See, e.g.*, *Cole*, 993 F.2d at 1332 ("[A] seizure occurs only when the pursued citizen is *physically touched* by the police *or* when he submits to a show of authority by the police.") (emphases added).

conflates two different kinds of seizures: seizures effected by intentional application of physical force and seizures effected by a mere show of authority. *See* Scholars' Amicus Br. 3.

This Court in *Hodari D.* highlighted the distinction. The question there was "whether, with respect to a show of authority *as with respect to application of physical force*, a seizure occurs even though the subject does not yield." 499 U.S. at 626 (emphasis added). In answering "no," the Court made clear that no submission was required for seizures effectuated by physical force: The Court explained that, at common law, "[t]o constitute an arrest," which is "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence," "the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in subduing the arrestee*, was sufficient." *Id.* at 624. And the BIO itself (at 10) quotes the critical language from *Hodari D.*: "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, *even when it is ultimately unsuccessful.* ('She seized the purse snatcher, but he broke out of her grasp.')." 499 U.S. at 626 (emphases added).

In short, the Court has drawn a distinction between, on the one hand, intentional use of physical force to apprehend someone, and, on the other hand, commanding someone to stop by a show of authority, without applying force. For a seizure to occur, submission is required in the latter circumstance, but not in the former. *Id.* Indeed, that is exactly what the Eighth, Ninth, and Eleventh Circuits, and the New Mexico Supreme Court, properly hold. *See Ludwig*, 54

F.3d at 471; *Nelson*, 685 F.3d at 876 n.4; *Carr*, 338 F.3d at 1269; *Garcia*, 217 P.3d at 1038.

Respondents simply repeat the Tenth Circuit's mistaken analysis to the contrary. They cite *Brendlin v. California*, 551 U.S. 249 (2007), for example, for the proposition that "[a] seizure occurs only when the suspect actually submits (voluntarily or otherwise) to the police officer's assertion of force or authority." BIO 8. That is not what *Brendlin* holds. As our petition explains, *Brendlin* involved a show-of-authority stop, not the use of force, and is not properly understood to mean that an application of physical force is not a seizure unless the person upon whom the force is applied submits to it. Pet. 21. Respondents also invoke *Hodari D.*, for the proposition that "neither usage nor common law tradition makes an *attempted* seizure a seizure." BIO 11 (quoting 499 U.S. at 626 n.2). Indeed, had Respondents' thirteen shots all missed Petitioner, it is entirely possible she would have no claim, for an attempt at physical contact is not a seizure. But *Hodari D.* holds that a seizure is effectuated at the moment of physical contact, regardless of what happens afterwards, and Respondents' gunfire went from an attempted seizure to an actual seizure the moment bullets struck and wounded Petitioner.

Instead of confronting the crucial distinction between physical-force seizures and show-of-authority seizures, Respondents spend most of their Brief in Opposition knocking down straw men. As initial matter, it is not Petitioner's position but this Court's precedents that create a "per se rule" that any amount of physical force is sufficient to effectuate a seizure. BIO 12; *Hodari D.*, 499 U.S. at 625 ("merely touching,

however slightly, the body of the accused" constitutes a seizure). Of course, the *reasonableness* of that seizure will turn on the totality of the circumstances, and as to that second inquiry, no per se rules obtain. But this case presents the antecedent question whether there was a seizure at all. And even if some applications of physical force are too slight or attenuated to constitute a seizure, the force applied in *this* case—Ms. Torres was hospitalized with gunshot wounds after the officers shot her and hit her in the back with two 9 mm rounds—suffices to implicate the Fourth Amendment.[2]

Respondents are plainly wrong when they say Petitioner advocates a "continuing seizure" rule. BIO 12-13. As the petition recognized (at 22 n.5), *Hodari D.* rejected a "continuing arrest" theory. Had Petitioner here somehow revealed inculpatory evidence after remaining at large for some time, it may well be that in an ensuing criminal case the evidence would not have been suppressed, because her seizure had not "continued" to that point. But the duration of the seizure is not at issue in this case; Petitioner's argument is that she was seized at the moment that Respondents' bullets, intentionally fired, struck and entered her body.

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[2] To the extent Respondents' cited cases stand for the proposition that the totality of circumstances may dictate whether a person would feel free to leave upon a police show of authority, BIO 12; *see, e.g.*, *United States v. Drayton*, 536 U.S. 194, 201 (2002), those citations only underscore Respondents' conflation of the two kinds of seizures. The cited cases involve show-of-authority seizures, not the kind of physical-force seizure at issue in this case.

The fact that she was not immediately apprehended does not retroactively erase the seizure.

Contrary to Respondents' assertion, BIO 20, this Court's cases mandate looking to the common law to understand the scope of the Fourth Amendment: *Hodari D.* defined the word "seizure" by reference to the common law of arrest. 499 U.S. at 624-25. And Respondents do not dispute that, at common law, "an officer effect[ed] an arrest of a person whom he ha[d] authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." *Id.* (internal quotations omitted). *See* Pet. 26.

And Respondents ultimately are wrong not only according to common law, but also according to common sense. Under Respondents' view, when officers shoot, tase, or beat a person, whether their actions constitute a seizure turns not on their conduct but on the ensuing conduct of the person shot, tased, or beaten. Pet. 28. That makes no sense, *id.*, *see* ACLU Amicus Br. 7; Cato Amicus Br. 7-8, and Respondents conspicuously offer no answer to that critical real-world point.

When the police intentionally shoot you and bullets enter your body, of course you are seized. The decision below to the contrary is wrong, and the issue is important and recurring, *see* Pet. 26-29; ACLU Amicus Br. 9-21; Cato Amicus Br. 9-11; Rutherford Amicus Br. 1-7; Scholars' Amicus Br. 17-19. This Court should take this needed opportunity to clarify that, under *Hodari D.* and its other decisions, an officer has seized you when he intentionally shoots or otherwise

applies physical force to you, and what transpires after that point does not change that result.

III. This Case Is A Perfect Vehicle For Resolving The Question.

The petition explains why this case is an ideal vehicle for resolving the question presented. Pet. 29-30. Respondents' only retort is that alternative bases could support the decision below. BIO 21-31. That assertion too is flawed and in any event provides no basis for denying certiorari.

Respondents urge that they used reasonable force in shooting Petitioner, and therefore they are entitled to judgment on the merits. BIO 21-26. They also contend that they are entitled to qualified immunity even if the shooting constituted a seizure, because reasonable officers would have believed their use of force was warranted. BIO 26-31. But the Tenth Circuit did not address either question. The sole basis for the decision below was the Court of Appeals' holding that there was no seizure in the first place: "an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot … terminate[s] [the suspect's] movement,'" Pet. App. 7a-8a (quoting *Brooks v. Gaenzle*, 614 F.3d 1213, 1224 (10th Cir. 2010)), and hence "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." Pet. App. 7a. The district court likewise addressed neither the reasonableness defense nor the qualified immunity defense. The district court ruled simply that "[b]ecause the officers did not stop Ms. Torres by shooting at her, there was no seizure," and "[b]ecause there was no seizure, there was

no violation of Ms. Torres' Fourth Amendment rights." Pet. App. 20a.

Indeed, the Tenth Circuit's decision to answer the Fourth Amendment question directly and explicitly makes this case a rare clean vehicle for resolving the question presented. Many courts resolve claims like Petitioner's at step two of the qualified immunity analysis (whether the right is clearly established) rather than at step one (whether there is a constitutional right at all), or by finding any possible seizure reasonable without answering the antecedent question of whether there was a seizure at all. This Court should thus decline Respondents' invitation to treat the Tenth Circuit's decision as though it had dodged the Fourth Amendment question and instead grant certiorari to resolve an issue that, as evidenced by Respondents' litany of district court cases, arises with great frequency. *See also* Cato Amicus Br. 9-11; Scholars' Amicus Br. 17-19.

And it is far from guaranteed that Respondents would have been successful had either court below passed on their alternative defenses. To the extent Respondents are proposing that the question presented here is relevant to whether they used excessive force when they decided to shoot Ms. Torres, that proposition was not raised below and is, at the very least, debatable. And several facts and inferences critical to both defenses were hotly contested below, making this case at least inappropriate for summary judgment on those grounds. *See Tolan v. Cotton*, 572 U.S. 650, 651 (2014). For example, although the officers testified at their depositions that they believed Ms. Torres was going to hit them with her car, neither

officer was in front of the vehicle. Pet. 6; Pet. App. 3a-4a, 11a, 23a; C.A. App. 110, 182-185, 190. And indeed, the bullets that hit Ms. Torres hit her in the back. Pet. 6; Pet. App. 4a, 23a; C.A. App. 109, 115, 116, 125. It is unclear how shooting Ms. Torres in these circumstances would be defensible, but at a minimum that is an issue for trial.

In any event, this Court routinely grants certiorari in cases where the novelty of the question presented may mean that other doctrines ultimately foreclose relief. *E.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (cert. granted on search question, notwithstanding invocation of good-faith exception); *see United States v. Carpenter*, 819 F.3d 880, 893-97 (6th Cir. 2016) (Stranch, J., concurring) (expressly invoking good-faith exception). The Court should follow its ordinary course here; the parties can litigate claimed alternative grounds for affirmance if the decision is reversed and the case remanded for further proceedings. *E.g.*, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371) (cert. granted on search question, notwithstanding invocation of consent and probable-cause issues); *see United States v. Byrd*, 742 F. App'x 587, 590 (3d Cir. 2018) (subsequent litigation of those issues on remand); *United States v. Byrd*, 388 F. Supp. 3d 406 (M.D. Pa. 2019) (same).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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